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Employment Discrimination -- Age Discrimination in the Employment Act of 1967 Bona Fide Occupational Qualification -- Hodgson v. Greyhound Lines, Inc.

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between the two corporations.[92] In *McKee,* where the lands, buildings, machinery, and tradenames were all transferred to the successor who continued to manufacture the same type of product, the court found no liability since there was no evidence of continuity of management or ownership.[93]

Competent business decisions are made daily in matters involving the acquisition of commercial interests. Where unknown or contingent liabilities may exist it is essential to a sound commercial decision that the law pertinent to the assumption of a predecessor corporation's liabilities be clear and predictable. The *Offen* decision, by utilizing a "sufficient similiar factors" approach in determining continuity, provides little guidance as to what course of conduct should be undertaken by a potential transferee. The standard of conduct required for protection might be the inspection and perfection of past products of the predecessor;[94] the inability to offer positions to the employees of the predecessor; and the inability to use the tradename so as not to be in any way related to the goodwill of the predecessor. If followed, this deviation from the predictability of past corporate liability doctrine will have an inhibitory impact on the commercial transfers of assets.

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Employment Discrimination—Age Discrimination in Employment Act of 1967—Bona Fide Occupational Qualification—*Hodgson v. Greyhound Lines, Inc.*[1]—The Secretary of Labor[2] brought suit against Greyhound Lines, Inc. (Greyhound), the nation's largest intercity bus carrier,[3] alleging that Greyhound's policy of refusing to accept applications for the position of intercity bus driver from persons thirty-five years of age and older[4] violated the Age Discrimination in Employment Act (ADEA or Act).[5] Specifically, the

[92] 288 F. Supp. at 821.

[93] 109 N.J. Super. at 570, 264 A.2d at 106.

[94] The Offen Company had been operating since 1928 and had produced hundreds of products which were located on several continents. Brief for Appellant, supra note 62 at 5. In Chadwick v. Air Reduction Co., 239 F. Supp. 247 (N.D. Ohio 1965), the court found that even when the successor knew that the predecessor had put a negligently designed device into the channels of commerce it was under no duty to warn third parties. Id. at 250.

[1] 499 F.2d 859 (7th Cir. 1974), cert. denied, — S. Ct. — (1975).

[2] The Secretary of Labor has the authority to enforce compliance with the ADEA. 29 U.S.C. § 216 (Supp. 1975); 29 U.S.C. § 626 (Supp. 1974).

[3] Hodgson v. Greyhound Lines, Inc., 354 F. Supp. 230, 232 (N.D. Ill. 1973).

[4] 499 F.2d at 860. Although Greyhound refuses to accept applications for the position of intercity bus driver from persons over 35, the Age Discrimination in Employment Act of 1967 (ADEA) applies only to individuals between the ages of 40 and 65. 29 U.S.C. § 631 (Supp. 1974). Thus, plaintiffs between 35 and 40 presumably would still be subject to discrimination on the basis of age even if Greyhound's request for a BFOQ was denied.

[5] 29 U.S.C. §§ 621 et seq. (Supp. 1974). For a discussion of the Act in general, see

Secretary charged Greyhound with violating section 4(a)(1),[6] by refusing to hire an individual because of his age, and section 4(a)(2),[7] by limiting or classifying its employees in such a way as to deny an individual an employment opportunity because of his age.[8] Greyhound contended that its maximum age hiring policy constituted a valid exception under section 4(f)(1) of the Act which provides: "It shall not be unlawful for an employer, (1) to take any action otherwise prohibited under subsections (a), (b), . . . or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business. . . ."[9]

Greyhound maintained that its maximum age hiring policy was based on public safety considerations and thus constituted a bona fide occupational qualification (BFOQ) outside the prohibitions of the Act.[10] It argued that as a common carrier it was required by law to exercise the highest degree of care in the hiring of its bus drivers;[11] that a physical examination is incapable of revealing those physical and sensory changes which are caused by age and which make an interstate bus driver less safe in the normal operation of defendant's business;[12] that the irregular work schedule of a beginning bus driver on the "extra board"[13] requires the highest degree of

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Agatstein, The Age Discrimination in Employment Act of 1967: A Critique, 19 N.Y.L.F. 309 (1973); Bergman, Age Discrimination in Employment & Air Carriers, 36 J. Air L. & Com. 3 (1970); Halgren, Age Discrimination in Employment Act of 1967, 43 L.A. Bar Ass'n Bull. 361 (1968); Kovarsky & Kovarsky, Economic, Medical and Legal Aspects of the Age Discrimination Laws in Employment, 27 Vand. L. Rev. 839 (1974); Note, Age Discrimination in Employment: The Problem of the Older Worker, 41 N.Y.U.L. Rev. 383 (1966); Note, 24 Baylor L. Rev. 601 (1972).

[6] This subsection of the statute provides: "(a) It shall be unlawful for an employer—(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age. . . ." 29 U.S.C. § 623(a)(1) (Supp. 1974).

[7] This subsection of the statute provides: "(a) It shall be unlawful for an employer—. . . (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; . . . ." 29 U.S.C. § 623(a)(2) (Supp. 1974).

[8] Greyhound was also charged with violating § 4(e) of the Act, 29 U.S.C. § 623(e) (Supp. 1974), because its advertisements allegedly differentiate on the basis of age. 499 F.2d at 860; 354 F. Supp. at 230. Neither the district court nor the Seventh Circuit discussed this issue, although the district court included violations of § 4(e) within the scope of its permanent injunction. 354 F. Supp. at 239.

[9] 29 U.S.C. § 623(f)(1) (Supp. 1974).

[10] 499 F.2d at 861.

[11] 354 F. Supp. at 232-33.

[12] Id. at 233-35.

[13] Within Greyhound's organization there are two general classifications of drivers; those who perform "regular runs" and those who perform "extra board." A regular run is one which is performed regularly and is a scheduled service between two points. On the other hand, "extra board" runs vary and are performed on the basis of passenger demand and consist of special operations, towns, charters, and extra sections of regular runs if there is a call for more than one bus on a regular run. Extra board drivers do not have scheduled routes and work off of the board on a

physical ability;[14] and that newly-employed drivers between age 40 and 65 could not acquire the experience that usually accompanies a good safety record.[15] However, the federal district court rejected Greyhound's underlying assumption that functional capacity is equivalent to chronological age, and concluded that the evidence presented by Greyhound did not meet the burden of "demonstrating that its policy of age limitation is reasonably necessary to the normal and safe operation of its business nor that age is a bona fide occupational qualification within the meaning of the Act."[16]

On appeal, Greyhound contended that the district court had imposed an improper burden of proof, and that as a matter of law the evidence demonstrated that Greyhound's hiring policy constituted a BFOQ reasonably necessary to the normal operation of its business.[17] In reversing the decision of the trial court, the United States Court of Appeals for the Seventh Circuit HELD: a bus company need only demonstrate a rational basis in fact that elimination of its maximum age hiring policy will increase the likelihood of risk to its passengers to establish that age constitutes a bona fide occupational qualification under the ADEA.[18] The court stated that more objective proof of the increase of risk of harm, as required by the district court, "would effectively require Greyhound to go so far as to experiment with the lives of passengers in order to provide statistical evidence pertaining to the capabilities of newly hired applicants forty to sixty-five years of age."[19] The court of appeals disregarded the facts relied upon by the trial court and the inferences formulated at the trial level and instead found Greyhound's hiring policy to be justified and grounded on an adequate factual basis.[20]

Following a brief discussion of the legislative history of the ADEA, with particular reference to the bona fide occupational qualification exception, this note will present an examination of the *Greyhound* decision. Additional guidelines for interpretation of the BFOQ exception, including federal regulations and similar case law arising under Title VII, will also be considered to provide a background for analysis of the case. In light of the available precedent, the standard of proof utilized by the district court will be

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first in, first out basis. . . . Extra board work and regular runs are assigned on the basis of seniority.

Id. at 235.

[14] Id. at 235-36.

[15] Id. at 236-37. Greyhound had presented evidence to show that an interstate bus driver is most safe after acquiring 16 years of interstate bus driving experience. Id.

[16] Id. at 239.

[17] 499 F.2d at 861.

[18] Id. at 863.

[19] Id. at 865. The trial judge had been critical of the evidence Greyhound presented concerning physical examinations and their underlying assumptions, the rigors of "extra board" work, and safety records by age group. 354 F. Supp. at 235-37.

[20] 499 F.2d at 865.

contrasted with the less stringent standard applied by the Seventh Circuit on appeal. Finally, the findings of fact of the district court will be examined to determine whether the appellate court was justified in impliedly rejecting those findings. It will be submitted that the Seventh Circuit's decision in *Greyhound* frustrates congressional intent, as expressed in the enactment of the ADEA, by permitting arbitrary and unreasonable age discrimination through an overly broad application of the BFOQ exception.

In recognition of increasing unemployment among older workers, Congress enacted the ADEA to promote the employment of older workers based on their ability.[21] The Act is directed against arbitrary discrimination "made in the absence of any legitimate relevance between age and employment capacity."[22] Under the Act, an employer is prohibited from refusing to hire, discharging, or otherwise discriminating against a person with respect to compensation or conditions of employment on the basis of age.[23] In addition an employer may not limit or classify his employees so as to deprive any individual of employment opportunities or adversely affect his position because of his age.[24]

The broad prohibitory provisions of the Act are qualified by specific exemptions which allow otherwise unlawful practices under certain conditions. Employers may discriminate where the differentiation is based on reasonable factors other than age.[25] For example, differentiations may be based on physical examinations where the job demands stringent physical requirements due to inherent occupational factors, and such requirements are reasonably related to the work to be performed.[26] The ADEA also allows discrimination if age is shown to be a "bona fide occupational qualification reason-

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[21] H.R. Rep. No. 805, 90th Cong., 1st Sess. (1967), reprinted in 1967 U.S. Code Cong. & Ad. News, 2213, 2214.

[22] Hearings on S. 830 & S. 788 Before the Subcomm. on Labor of the Senate Comm. on Labor & Public Welfare, 90th Cong., 1st Sess., at 37 (1967) (statement of W. Wirtz, Secretary of Labor).

[23] 29 U.S.C. § 623(a)(1) (Supp. 1974).

[24] 29 U.S.C. § 623(a)(2) (Supp. 1974).

[25] 29 U.S.C. § 623(f)(1) (Supp. 1974).

[26] 29 C.F.R. § 860.103(f)(ii) (1972) (sandhogs, iron workers, bridge builders). The regulations concerning this particular exemption make it clear that differentiations based on blanket assumptions that all individuals over a certain age are incapable of performing certain jobs will not be accepted. 29 C.F.R. § 806.103(f)(iii) (1972). In reply to an inquiry whether a company could continue to make use of help wanted advertisements containing age limitations if the work involved heavy manual labor, the wage and hour administrator replied:

> We do not think it would be correct to conclude that every individual above a chosen age limit is physically unable to perform the vigorous work you describe. The fact that many, or even most, such individuals may be so disqualified does not make a case for application of this exemption, for it is the arbitrary and unreasonable age discrimination against the others, who are physically qualified notwithstanding their age, which is the essence of the wrong prohibited by this act.

Administrative Opinion Letter from Clarence J. Lundquist, Wage and Hour Administrator, July 26, 1968, reprinted in 8 BNA Lab. Rel. Rep. ¶¶ 401:5205, 5206.

ably necessary to the normal operation of the particular business."[27] Greyhound relied upon this latter provision to justify its hiring policy.[28]

Throughout the Act and its accompanying regulations,[29] it is stressed that blanket assertions or conclusionary statements that all members of a particular age group are incapable of certain physical functions will not form a basis for a valid exemption to the ADEA. While experience may have shown that the majority of individuals above a certain age no longer possess certain qualifications for a job, some individuals may still retain these capabilities. Thus discrimination based on age is forbidden.[30] Attempts at exemption from the Act, such as the declaration of a BFOQ, must be judged individually on a case by case basis, in the context of the pertinent facts surrounding each particular situation.[31]

The legislative history of the ADEA offers little guidance to the courts in interpreting the BFOQ exemption.[32] Consequently, the courts have turned to various other interpretative aids, including: (1) the similarity between the BFOQ exemption under the ADEA[33] and that under Title VII;[34] (2) case law involving age, sex, and racial discrimination; and (3) federal regulations issued in conjunction with the ADEA.

The origins of the ADEA intertwine with the enactment of Title VII of the Civil Rights Act of 1964, which prohibits discrimination based on sex, race, or national origin.[35] That statute authorized the Secretary of Labor to undertake a study which resulted in specific legislative action designed to eliminate arbitrary age discrimination, the ADEA.[36] If the word "age" were to be substituted for "race, color, religion, sex, or national origin," the BFOQ provision of the ADEA would be identical to that of Title VII under the Civil Rights Act of 1964.[37] Unfortunately, there is a similar lack of legislative history concerning the BFOQ under Title

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[27] 29 U.S.C. § 623(f)(1) (Supp. 1974). See text at note 9 supra.

[28] 499 F.2d at 861. In addition to the two exceptions discussed in the text, employers may differentiate on the basis of age to observe the terms of a bona fide seniority system or pension plan, 29 U.S.C. § 623(f)(2) (Supp. 1974), or to discharge or discipline an employee for good cause. 29 U.S.C. § 623(f)(3) (Supp. 1974).

[29] The Secretary of Labor is given the authority to promulgate interpretative regulations in connection with the ADEA. 29 U.S.C. § 628 (Supp. 1975). See 29 C.F.R. §§ 850.1-860.120 (1972).

[30] 29 C.F.R. § 860.103(g) (1972).

[31] 29 C.F.R. § 860.102(b) (1972).

[32] H.R. Rep. No. 805, 90th Cong., 1st Sess. (1967), reprinted in 1967 U.S. Code Cong. & Ad. News 2213.

[33] 29 U.S.C. § 623(f)(1) (Supp. 1974).

[34] 42 U.S.C. § 2000e-2(e)(1) (1970).

[35] 42 U.S.C. §§ 2000e et seq. (1970).

[36] H.R. Rep. No. 805, 90th Cong., 1st Sess. (1967), reprinted in 1967 U.S. Code Cong. & Ad. News 2213, 2214.

[37] Hodgson v. First Fed. Sav. & Loan Ass'n, 455 F.2d 818, 820 (5th Cir. 1972). Compare 29 U.S.C. § 623(f)(1) (Supp. 1974) with 42 U.S.C. § 2000e-2(e)(1) (1970).

VII. The Title VII BFOQ exemption was added on the last day of debate with no committee hearings.[38] However, the similarity of language between the BFOQ provisions of these two acts has fostered judicial application of Title VII case law as precedent in age discrimination cases.[39]

Early cases construing the exemption under Title VII interpreted the phrases "bona fide" and "reasonably necessary" to mean good faith on the part of the employer.[40] This interpretation of the exemption demanded only that the employer demonstrate that his exclusive hiring policy was not based on an intent to discriminate.[41] This subjective test was modified, however, by the Fifth Circuit in *Weeks v. Southern Bell Telephone & Telegraph Co.*,[42] which required that generalizations concerning the capabilities of the respective sexes be based on fact.[43] It is this latter standard which is the subject of controversy in the *Greyhound* case.[44]

Greyhound is the second case in which the BFOQ exemption under the ADEA has been interpreted. The only prior case, *Hodgson v. Tamiami Trail Tours*,[45] presented an almost identical fact situation involving an affiliate of the independent intercity bus companies operating as "Trailways."[46] In that case, a federal district court in Florida held that the maximum age hiring policy of the employer bus company did constitute a BFOQ necessary for efficient business operations and in furtherance of the public interest.[47] While the court in *Tamiami* found that the substantive test of *Weeks* required the defendant to have an objective factual basis for its belief, it also decided that it was impractical to require an employer to consider individually the qualifications of each applicant.[48] The court accepted chronological age as the most effective tool for screening out bus driver applicants likely to be unsatisfactory.[49]

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[38] See Vaas, Title VII: Legislative History, 7 B.C. Ind. & Com. L. Rev. 431, 441-42 (1966); Note, 8 Wake Forest L. Rev. 124, 125 (1971).

[39] Hodgson v. First Fed. Sav. & Loan Ass'n, 455 F.2d 818, 820-22 (5th Cir. 1972).

[40] Bowe v. Colgate-Palmolive Co., 272 F. Supp. 332, 361 (S.D. Ind. 1967), modified, 416 F.2d 711 (7th Cir. 1969); Ward v. Firestone Tire & Rubber Co., 260 F. Supp. 579, 581 (W.D. Tenn. 1966). For a further discussion of the BFOQ under Title VII, see Comment, 1973-1974 Annual Survey of Labor Relations Law, 15 B.C. Ind. & Com. L. Rev. 1105, 1205, 1218-31 (1974); Note, 25 Ark. L. Rev. 333 (1971); Note, 12 B.C. Ind. & Com. L. Rev. 747 (1971); Note, 3 Texas Tech. L. Rev. 197 (1971); Note, 1968 Utah L. Rev. 395; Note, 8 Wake Forest L. Rev. 124 (1971); Note, 17 Wayne L. Rev. 242 (1971).

[41] Bowe v. Colgate-Palmolive Co., 272 F. Supp. 332, 361 (S.D. Ind. 1967), modified, 416 F.2d 711 (7th Cir. 1969); Ward v. Firestone Tire & Rubber Co., 260 F. Supp. 579, 581 (W.D. Tenn. 1966).

[42] 408 F.2d 228 (5th Cir. 1969).

[43] Id. at 235.

[44] 499 F.2d at 861-62.

[45] 4 EPD ¶ 7795, at 6047 (S.D. Fla. 1972).

[46] Id. at 6049 n.1.

[47] Id. at 6052.

[48] Id. at 6050.

[49] Id. at 6052. Although neither the lower court nor the appellate court in *Greyhound*

The primary sources of information and guidance on the BFOQ under the ADEA are the federal regulations issued by the Department of Labor in conjunction with the Act.[50] Within these interpretative aids, the Secretary of Labor has given a consistently narrow interpretation to the bona fide occupational qualification section.[51] When faced with a problem of statutory construction, great deference is shown the interpretation of a statute expressed in the regulations of the agency charged with its administration.[52] Two examples of a BFOQ are described in the regulations: (1) jobs wherein an actor or model must be of a particular age or appearance;[53] and (2) jobs for which qualifications are imposed by federal statutes and regulations to promote the safety and convenience of the public.[54] Included under the latter category are airline pilots forbidden from engaging in carrier operations after age sixty by regulations of the Federal Aviation Administration.[55] The government apparently felt that the extent of the safety risk posed by elderly pilots justified the imposition of a mandatory retirement age without reference to the individual's actual physical condition at the terminal age. No federal regulations are currently in effect requiring a compulsory retirement age for intercity bus drivers or a maximum age hiring policy for either bus drivers or airline pilots. The hiring age involved in the instant controversy was fixed by Greyhound and not by a public agency, such as the FAA, and thus does not fall within the scope of the Labor Department regulations, which speak only in terms of "federal statutory and regulatory requirements."[56] As the Department of Transportation has promulgated extensive regulations governing the physical conditions of intercity bus drivers,[57] it would seem that the Department also would have instituted a maximum age hiring policy if it were considered necessary to protect the public.

As a consequence of the scarcity both of legislative history of the ADEA and relevant age discrimination case law, the analysis of the Seventh Circuit's decision in *Greyhound* must be based upon interpretations of the ADEA by the agency charged with its en-

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cited *Tamiami*, the attention of both *Greyhound* courts was directed to the decision and much of the appellate court's reasoning parallels that of the district court in *Tamiami*. See Brief for Plaintiff at 49, Hodgson v. Greyhound Lines, Inc., 499 F.2d 859 (7th Cir. 1974). For a general illustration of parallels in the two cases compare 499 F.2d at 861-65 with 4 EPD ¶ 7795, at 6048-52.

[50] 29 C.F.R. §§ 850.1-860.120 (1972).

[51] 29 C.F.R. § 860.102(b) (1972).

[52] Udall v. Tallman, 380 U.S. 1, 16 (1965).

[53] 29 C.F.R. § 860.102(e) (1972).

[54] 49 C.F.R. § 860.102(d) (1972).

[55] See id. For a fuller discussion of the legality of a mandatory retirement age for pilots and the unsettled controversy concerning those individual companies who maintain maximum age hiring policies, see Bergman supra note 5, at 11-27.

[56] 29 C.F.R. § 860.102(d) (1972).

[57] 49 C.F.R. § 391.1-.67 (1974). See note 104 infra for a discussion of regulations of the Dept. of Transportation concerning intercity bus drivers.

forcement and upon analogous statutes and case law. The key issue raised on appeal was the employer's burden of proof under the ADEA. Greyhound contended that the trial court imposed an improper burden of proof on it.[58] Since proof of Greyhound's maximum age hiring policy had established a prima facie case of age discrimination under federal regulations,[59] the burden of justification was on Greyhound, the employer, to establish a bona fide occupational qualification.[60] Greyhound maintained, however, that the standard of proof required by the district court to establish the existence of the BFOQ was incorrect.[61]

In light of the similarity of sex and age discrimination cases, which involve comparable bona fide occupational qualification provisions,[62] the *Greyhound* district court utilized the standard of proof of a BFOQ formulated in a sex discrimination case, *Weeks v. Southern Bell Telephone & Telegraph Co.*[63] *Weeks* involved discriminatory practices by a telephone company, which refused to consider women for the position of telephone switchman. As an affirmative defense, Southern Bell argued that its sex-based restriction was a bona fide occupational qualification because women as a class were unable to cope with the allegedly strenuous activity of lifting weights in excess of thirty pounds.[64] The *Weeks* court denied the telephone company a BFOQ exemption, holding that the company failed to prove that it "had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved."[65] The Fifth Circuit viewed the use of an employment classification based upon a stereotyped characterization of women as a group, with no factual evidence to sustain that classification, as constituting arbitrary and unjust discrimination.[66]

The Seventh Circuit in *Greyhound,* however, found the standard of proof enunciated in *Weeks* inappropriate since that case did not involve "a situation where the lives of numerous persons are completely dependent on the capabilities of the job applicant."[67] Instead the court found what it believed to be a more appropriate standard in a sex discrimination case involving the airline industry, since the primary function of that industry is also the safe transportation of passengers.[68] In that case, *Diaz v. Pan American World*

[58] 499 F.2d at 860.

[59] Id.

[60] 29 C.F.R. § 860.102(b) (1972).

[61] 499 F.2d at 860.

[62] See text at notes 35-39 supra.

[63] 408 F.2d 228 (5th Cir. 1969).

[64] Southern Bell had placed great weight on state protective legislation which prohibited women and minors from lifting weights over 30 pounds. Id. at 232.

[65] Id. at 235.

[66] Id. at 234-35.

[67] 499 F.2d at 861-62.

[68] Id. at 862.

Airways, Inc.,[69] a male applied for a job as flight cabin attendant with Pan American Airlines. He was rejected because Pan Am's hiring policy restricted consideration of applicants for that position to females. In its analysis of the standard of proof required to establish a "bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise,"[70] the court in *Diaz* construed the word "necessary" to require "that we apply a business necessity test, not a business convenience test. That is to say, discrimination based on sex is valid only when the essence of the business operation would be undermined by not hiring members of one sex exclusively."[71] The Fifth Circuit concluded that the non-mechanical aspects of the job of flight cabin attendant,[72] which male applicants were deemed incapable of performing, were not reasonably necessary to the normal operation or essence of Pan Am's business.[73] Thus, the granting of a BFOQ exemption was not warranted.

In its rejection of *Weeks* in favor of the *Diaz* standard, the appellate court in *Greyhound* seemed to imply that the formulae established in these two cases were mutually exclusive.[74] In reality, however, the standard of proof applied in *Weeks* is not inconsistent with that formulated in *Diaz*. The Fifth Circuit in *Diaz* distinguished its earlier decision in *Weeks* by establishing: (1) that all or substantially all men had not been shown to be inadequate for the position of flight cabin attendant; and (2) the nonmechanical duties of the disputed position in *Diaz* were not necessary to the normal operation of business.[75] These two cases, when read together, require that if there exists a factual basis to justify a discriminatory pre-employment qualification, that qualification must still be functionally related to the essence of the business involved to be a valid BFOQ. It is submitted that such a two pronged test should have been applied in *Greyhound*. Under such a test, Greyhound would be required to prove that the qualifications of its bus drivers are related to the essence of its business, the safe transportation of passengers, as well as the premise that all or substantially all applicants over forty posed a significant safety risk.

It initially appears that the Seventh Circuit in *Greyhound* abandoned *Weeks* for the standard of proof articulated in *Diaz*. However, the court did not rely on *Diaz*, but merely used its interpretation of that case as a justification for abandoning the test

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[69] 442 F.2d 385 (5th Cir. 1971).

[70] 42 U.S.C. § 2000e-2(e)(1) (1974).

[71] 442 F.2d at 388.

[72] The non-mechanical aspects of a flight attendant's job included attending to the special psychological needs of the passengers. Id. at 387.

[73] Id. at 388-89.

[74] See 499 F.2d at 861-62.

[75] 442 F.2d at 388.

specified in *Weeks*.[76] For a statement of the proper standard of proof, the *Greyhound* court relied upon a second airline industry case, *Spurlock v. United Airlines, Inc.*[77] Spurlock involved a challenge to the pre-employment pilot qualifications established by United Airlines, which required 500 hours of flight time and a college degree. This requirement had a disparate impact in that it fell more heavily on black applicants than white and thus led to a charge of racial discrimination. The Tenth Circuit held that in those jobs involving a high degree of skill and a great potential for economic and human risk due to the hiring of an unqualified applicant, "the employer bears a correspondingly lighter burden to show that his employment criteria are job-related."[78] Thus, since United's flight officers pilot aircraft worth $20 million and carry 300 passengers per flight, United Airlines could meet the lighter burden of proving that its employment requirements were job related. Thus, in its extended reliance on the lighter burden language of *Spurlock*,[79] the Seventh Circuit in *Greyhound* applied a standard of proof so deferential to the defendant as to broaden the exemption in a manner that renders the prohibitions of the ADEA almost meaningless. The Seventh Circuit merely required Greyhound to demonstrate that it has a rational basis in fact to believe that elimination of its maximum hiring age would result in a minimal increase in risk of harm by jeopardizing the life of one more person than might otherwise occur.[80]

Despite the similarity of the safe transportation factor involved in both *Spurlock* and *Greyhound*, crucial distinctions may be drawn between these two cases. *Greyhound* is a BFOQ case dealing with an asserted exception to the charge of age discrimination. It clearly belongs in the realm of *Diaz* and especially *Weeks*, similar BFOQ cases dealing with comparable legislative language in the area of sex discrimination. The *Spurlock* situation would appear to bear a greater resemblance to that exemption in the ADEA which allows differentiation based on reasonable factors other than age,[81] rather than the BFOQ exemption. The requirements established by United in *Spurlock* were found statistically to have a reasonable relationship to the position in question.[82] Furthermore, the burden of justification arguably should differ with the magnitude of the risk involved. This decrease in the required standard of proof in relationship to the amount of risk involved would seem to be substantiated by the absence of federal regulations governing the retirement

[76] 499 F.2d at 861-62.
[77] 475 F.2d 216 (10th Cir. 1973).
[78] Id. at 219.
[79] 499 F.2d at 863.
[80] Id. at 863.
[81] 29 U.S.C. § 623(f)(1) (Supp. 1974). See text at notes 25-26 supra.
[82] 475 F.2d at 218-19.

age of bus drivers while regulating that of pilots. There is a difference in the potential risk posed by an airline pilot lacking in essential flight skills and an otherwise qualified person beyond a certain age driving an intercity bus. The results of a miscalculation are far more disastrous in the former instance than in the latter. Thus, while the burden of proof perhaps should be lowered for the employer of airline pilots in consideration of the magnitude of the risk, more stringent standards should be required for the employer of intercity bus drivers.

The Seventh Circuit based its reliance on *Spurlock* solely on the common feature of the industries involved, the safe transportation of passengers.[83] However, the trial judge in *Greyhound* stressed that in deciding whether all or substantially all bus driver applicants over the age of forty would constitute a risk to the public, "[s]afety is the foremost concern involved herein not only for defendant but for plaintiff and this Court as well . . . ."[84] Thus, the district court had already lowered the *Diaz-Weeks* burden of proof in terms of the higher duty of care owed by a common carrier.[85] It appears that the Seventh Circuit in *Greyhound* actually applied the district court's standard of proof. The appellate court's determination that "Greyhound must demonstrate it has a rational basis in fact to believe that elimination of its maximum hiring age will increase the likelihood of risk of harm to its passengers"[86] would appear to delineate substantially the same standard as the district court's requirement that Greyhound must have " 'reasonable cause to believe, that is, a factual basis for believing, that all or substantially all [applicants over 40] . . . would be unable to perform safely and efficiently the duties of the job involved.' "[87]

As it is submitted that the appellate court utilized the same standard of proof as the district court in *Greyhound,* it is further submitted that the appellate court erred in disregarding the facts as found by the district court. Under Rule 52 of the Federal Rules of Civil Procedure, the appellate court does not review the evidence as an original fact finding tribunal;[88] it does not attempt to settle conflicts in evidence or to determine questions of credibility.[89] The district court found that Greyhound failed to establish the minimal rational relationship between its discriminatory pre-employment

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[83] 499 F.2d at 862-63.

[84] 354 F. Supp. at 239.

[85] While the district court in *Greyhound* does not refer specifically to the *Diaz* case, the opinion speaks in terms of the "essence" of a business. Id. at 231-32.

[86] 499 F.2d at 863.

[87] 354 F. Supp. at 236, quoting Weeks v. Southern Bell Tel. & Tel., 408 F.2d 228, 235 (1969).

[88] "Findings of fact shall not be set aside unless clearly erroneous . . . ." Fed. R. Civ. P. 52.

[89] Id.

criteria and its proffered goal of safety.[90] The facts as found by the district court should have been accepted unless clearly erroneous.

While it was recognized by both the district and appellate courts that safety was of primary concern,[91] the district court held that Greyhound did not prove the conclusionary determination that all applicants over forty would be incapable of performing as an intercity bus driver.[92] Greyhound originally established its maximum age hiring policy at the time of its incorporation in 1929, without benefit of surveys, inquiries, or research or statistical studies.[93] The same age limitations have remained in effect despite recent advances in medical diagnosis and improvement in the technology of buses.[94] The district court found that without a further factual basis, such a good faith classification violated the intent of the ADEA to promote individualized determination of fitness, and thus did not satisfy the factual basis required by the *Weeks* decision.[95]

Contrary to the "findings" of the appellate court, the district court found that Greyhound could meet its public safety responsibilities as a common carrier through less arbitrary measures than an absolute exclusion of every applicant over age forty.[96] The argument presented to the appellate court by Greyhound[97] resembles a statement in *Tamiami* that " 'where an employer sustains its burden in demonstrating that it is impossible or highly impractical to deal with . . . [applicants] on an individualized basis, it may apply a reasonable general rule.' "[98] The argument bears no weight in *Greyhound,* however, for the district court found that the screening processes already employed by Greyhound provided ample opportunity to exclude unsuitable individuals.[99]

The inability of physical examinations to detect the functional age of an applicant was cited by Greyhound as the primary justifica-

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[90] 354 F. Supp. 239.

[91] 499 F.2d at 863; 354 F. Supp. at 239.

[92] 354 F. Supp. at 236. The basis of Greyhound's argument was that imperceptible physical and sensory changes caused by aging and the detrimental effects these changes have on driving skills preclude the acceptance of job applicants over age forty. 499 F.2d at 863. However, due to conflicting evidence from witnesses on both sides of the case, the district court found there was no agreement as to the reliability or the proper weight to be accorded physical examinations as a means of discovering these changes. 354 F. Supp. at 235. The primary purpose of the health examination given by Greyhound was recognized as the detection of gross physical and mental defects that would affect an applicant's ability to drive a bus. Id. at 232.

[93] 354 F. Supp. at 238.

[94] Id. The district court took into consideration the introduction of diesel powered buses which are easier to manipulate, improved roads, and more extensive training practices. Id.

[95] Id.

[96] Id. at 239.

[97] 499 F.2d at 864.

[98] 4 EPD ¶ 7795, at 6050, quoting *Weeks,* 408 F.2d at 235 n.5.

[99] 354 F. Supp. at 239.

tion for the arbitrary age limit of age forty.[100] Dispute is evidenced, however, by contradictory testimony from expert witnesses as to the extent to which chronological age is a reliable index of physical or psychological decline.[101] Greyhound also maintained that even if it were able to adequately screen out "degenerative disabilities occasioned by age in the forty to sixty-five age bracket, it is questionable whether Greyhound could practicably scrutinize the continued fitness of such drivers on a frequent and regular basis."[102] This impracticality aspect of Greyhound's argument was rejected by the district court.[103] Physical examinations form only a portion of Greyhound's total testing procedures capable of detecting changes brought about by the aging process.[104] The district court found that these screening procedures utilized by Greyhound demonstrated the exercise of a high degree of care by the defendant.[105]

The testing procedures currently utilized by Greyhound are apparently competent to determine the functional ability of those drivers over forty already employed by the company. Greyhound has never instituted a policy recommending that all drivers over forty should retire.[106] Thus, it appears that the procedures currently in effect for testing applicants and employees are so extensive that only individuals of the highest physical condition are initially accepted. From the pool of applicants below age forty, only 5 percent meet the rigid requirements in effect, despite their age.[107] The district court held that these procedures were particularly suited to the achievement of safety through the individual determination of functional age.[108] The procedures utilized for employees would

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[100] Id. at 233.

[101] Similar problems concerning the relationship of chronological and functional age have arisen in other industries. The research center for the FAA found:

> [A]t the present time no medical methods exist for evaluating an adult human being in terms that will provide a useful estimate of his overall status as an aging animal . . . chronological age fails to serve as an accurate index of the rate at which these capabilities change in every individual. Men who are in their fifth and sixth decades function, whereas young men may be old for their age.

FAA Office of Aviation Medicine, Studies on Aging in Aviation Personnel 64-1 (Aug. 1964). Cited in Bergman at 21, see note 5 supra.

[102] 499 F.2d at 864.

[103] 354 F. Supp. at 239.

[104] In addition to the physical examination required by federal regulations at two-year intervals until age fifty and annually thereafter to age 65, 354 F. Supp. at 233, Greyhound utilizes continuous monitoring procedures to detect personality changes, changes in reaction time, and difficulty in dealing with adverse weather and special visibility conditions. Id. Minimum standards set by the Department of Transportation also require a low-accident rate, safe driving habits and a detailed background investigation of the individual concerning driving record, financial responsibility, criminal record and past employment history. 49 C.F.R. §§ 391.21, 391.23, 391.25, 391.27 (1973).

[105] 354 F. Supp. at 233.

[106] Id.

[107] Brief for Plaintiff at 25-26, Hodgson v. Greyhound Lines, Inc., 499 F.2d 859 (7th Cir. 1974) [hereinafter cited as Brief for Plaintiff].

[108] 354 F. Supp. at 239.

merely have to be extended to the applicant level to replace the present arbitrary discrimination based on age.

Since it retains drivers who have reached their fortieth birthday,[109] it is apparent that Greyhound does not question a person's ability to drive a bus when he is over forty years of age. Greyhound does maintain, however, that older drivers may compensate for this aging process and the alleged accompanying physical decline by obtaining regular runs.[110] Greyhound's seniority system demands that beginning drivers serve from 10 to 20 years on the extra board, making charter and non-regular runs on the basis of passenger demand.[111] Thus, a beginning driver over age forty could not compensate for the alleged age-related decline in his driving ability because he is working the extra board.[112] The district court did not find this distinction drawn by Greyhound between the extra board and regular runs viable. The district court found that irregular hours and possible adverse driving conditions would have no greater effect on those applicants over forty than on those under forty.[113]

Finally, the district court rejected as determinative Greyhound's statistical studies which reflected, among other things, that Greyhound's safest driver is one who has had 16 to 20 years of driving experience with Greyhound and is between 50 to 55 years of age.[114] This optimum blend of age and experience could never be

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[109] Id. at 233.

[110] 499 F.2d at 864. See note 13 supra.

[111] 354 F. Supp. at 231, 235. The seniority system prescribing that new drivers go to the bottom of the extra board is specified in Greyhound's union contract, a result of collective bargaining. Id. No question was raised as to the validity of this system under the ADEA. While on the extra board, a driver is on call 24 hours a day, seven days a week performing charter and other unscheduled trips outside the territory served by Greyhound's regular runs. 499 F.2d at 864. However, Greyhound's union contract guarantees an off period of twenty-four consecutive hours in a calendar week. Brief for Plaintiff, supra note 107, at 12. Additionally, federal regulations forbid a driver to drive more than ten hours or be on duty for more than fifteen hours (including driving time) in a twenty-four hour period without at least eight consecutive hours off. 49 C.F.R. § 395.3(a) (1973). Finally, the monthly mileage of a regular driver is generally twice that of a driver on the extra board. 354 F. Supp. at 237.

[112] 354 F. Supp. at 235.

[113] Id. at 235-36. Every applicant would seem to have the right to an undesirable job. In a similar situation involving sex discrimination, the court held that a woman was entitled to apply for an unromantic job involving long hours and poor working conditions if she so desired. Cheatwood v. Southern Cent. Bell Tel. & Tel. Co., 303 F. Supp. 754, 758 (N.D. Alas. 1969).

The district court found Greyhound's employment of older extra board drivers on certain occasions inconsistent with the safety considerations it presented at trial. 354 F. Supp. at 237-38. It is an annual practice to employ schoolteachers until age fifty for work on the extra board during peak summer months. Id. at 238. Greyhound regularly leases equipment and drivers from other companies to cover runs outside Greyhound's authorized territory, regardless of the age at which these drivers were employed. Id. at 237-38. Finally, Greyhound's own older drivers who wish to do so may continue to bid on and perform extra board work until their retirement. Id. at 236. Other drivers remain on extra board runs despite twenty years of experience because they have not yet accumulated sufficient seniority to take over a regular position. Id.

[114] 354 F. Supp. at 236-37.

obtained by those applicants over forty years of age. However, while Greyhound formulated this portrait of its optimum driver, it has provided no statistical study of the acceptable or quite capable driver.

The validity of other statistics furnished by Greyhound was questioned by the district court.[115] Greyhound maintained, for example, that the accident rate of a driver over age 55 begins to increase slightly due to the fact that his age has begun to offset his experience.[116] However, there was testimony that this slight upswing was not significantly different from chance.[117] In addition, the statistics introduced by Greyhound did not take into account the number of miles logged by drivers in each group.[118] Thus, it is impossible to compare accidents per mile driven in relation to the driver's age. The district court found the question unanswered whether a person over forty is less safe than one under forty as the evidence was not sufficiently broken down to isolate age as a significant variable.[119] Other factors pertinent to the causation of accidents may have influenced these statistics other than age—working conditions such as weather, time of day, traffic conditions, highway design and hours driven before the accident.[120]

In actuality, Greyhound did not utilize those statistics which would have been most helpful and enlightening. Greyhound did not compare the accident rates of its extra board drivers over the age of forty with those of its extra board drivers below the age of forty.[121] Nor did it compare the relationship between age and failure at the applicant training stage.[122] Rather, Greyhound chose to compare either the records of all drivers over forty with those under that age, making no distinction between extra board and regular run drivers, or extra board drivers with those on regular runs, regardless of age. Thus, the district court found that the better safety record of drivers over age forty could be held to apply to extra board as well as regular run drivers.[123]

It is submitted that the facts discussed above as found by the district court were not so unsubstantiated as to be deemed clearly erroneous. The fact that Greyhound had the ability to produce the best statistical evidence and did not, might have supported the inference that such evidence was withheld because it was detrimental to Greyhound's cause.[124] If the appellate court concluded that the inferences accepted by the district court as findings of fact were

[115] Id. at 237.
[116] Id. at 236.
[117] Id. at 237.
[118] Id.
[119] Id.
[120] Brief for Plaintiff, supra note 107, at 28.
[121] 354 F. Supp. at 236.
[122] Id.
[123] Id.
[124] Stocker v. Boston & Maine R.R., 84 N.H. 377, 151 Atl. 457 (1930).

mistaken, the correct course would have been to remand for further fact finding. The complete rejection of the findings of the trial court in the present situation was unwarranted.

It appears that the appellate court in *Grayhound* erred in overturning the district court's denial of a BFOQ exemption for the maximum age hiring policy of Greyhound. Since the appellate court, in effect, applied the standard of proof utilized by the district court, it was not justified in disregarding the evidentiary findings of the trial court. The appellate court found that Greyhound's good faith judgment concerning the safety needs of its passengers constituted a rational basis in fact to believe that all or substantially all applicants over forty were incapable of performing the duties of an intercity bus driver.[125] On the basis of dicta in the *Weeks* opinion,[126] Greyhound asserted that it was relieved of the necessity of proving that "all or substantially all" applicants were unfit due to the impracticality of the individual determination of the capabilities of each applicant.[127] This argument is not warranted by the facts, however. The district court held that individual consideration was indeed possible and that Greyhound's good faith judgment was not a sufficient factual basis to support a discriminatory hiring policy.[128] The appellate court's reliance on Greyhound's good intentions harks back to the subjective test of the early Title VII cases which was clearly rejected by the Fifth Circuit in *Weeks*[129] and should not receive renewed life in age discrimination cases.

It is submitted that the Seventh Circuit's acceptance of Greyhound's conclusionary assumption that older applicants pose a safety risk violates the essence of the ADEA. The *Greyhound* decision provides a precedent in the area of common carriers and other industries responsible for the safety of the public allowing the declaration of a bona fide occupational qualification under the ADEA by a mere showing of a rational basis in fact and a minimal increase in risk of harm to passengers. In contrast to the requirements of the ADEA, *Greyhound* thus appears to require less than a showing that discrimination on the basis of age is reasonably necessary to the normal operation of the business involved in order to establish a bona fide occupational qualification. As the leading decision on the BFOQ under the ADEA, *Greyhound* has opened the door for the exception to overwhelm the Act and frustrate attempts to remedy arbitrary age discrimination.

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[125] 499 F.2d at 865.

[126] 408 F.2d at 236 n.5.

[127] 499 F.2d at 864.

[128] 354 F. Supp. at 238-39.

[129] For a discussion of the subjective "good faith" test, see text at n.40 supra.